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In the Supreme Court of the United States

OCTOBER TERM, 1976

76-1487

CONTINENTAL CASUALTY COMPANY, PETITIONER,

v.

CHAMPION INTERNATIONAL CORPORATION

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

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Continental Casualty Company petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A) is reported at 546 F.2d 502. The opinion of the district court on the issue of liability (App. D) is reported at 400 F. Supp. 978. Its separate opinion on the issue of damages (App. E) is not reported.

JURISDICTION

The judgment of the court of appeals (App. B) was entered on December 9, 1976, and a timely petition for rehearing with suggestion for rehearing *en banc* (App. C) was denied on January 26, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals violated the principles established in *Erie R.R. v. Tompkins* by refusing to apply the laws of any State in adjudicating a State-created contract action arising under its diversity jurisdiction.

2. Whether the decision below improperly burdens interstate commerce by confusing the sources of the law to be applied in diversity cases in interpreting standardized terms of commercial insurance policies used nationwide.

3. Whether the court of appeals should have refused to resort to State law because application of the decisional law of the appropriate State would have imposed a substantial burden on interstate commerce.

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, § 8, ¶ 3 of the United States Constitution provides, in pertinent part:

The Congress shall have Power . . . To regulate Commerce . . . among the several States. . . .

Article VI of the United States Constitution provides, in pertinent part:

This Constitution . . . shall be the supreme Law of the land; and the Judges in every State shall be bound thereby. . . .

The Fifth Amendment of the United States Constitution provides, in pertinent part:

No person shall be . . . deprived of life, liberty or property, without due process of law

STATEMENT

In this diversity case, the court of appeals resolved a question concerning the proper definition of a standard

provision of comprehensive commercial liability insurance policies in use throughout the United States contrary to the decisions of the highest court of the State in which the action arose and in a manner which conflicts with decisions of other federal courts of appeals. In so doing, the court below has created nationwide confusion as to whether State law controls the interpretation of such contract provisions in diversity cases. This conflict will adversely affect consumers of defective products, manufacturers, their insurance carriers, and interstate commerce in manufactured products and in insurance. The decision below and its rationale also present important constitutional questions concerning the manner in which inferior federal courts should exercise their diversity jurisdiction where application of State law could substantially impede interstate commerce. This case thus presents the Court with the question whether there should be an independent constitutional limitation derived from the Commerce Clause on the application of the doctrine of *Erie R.R. v. Tompkins* in diversity cases.

Champion International Corporation, a New York company, instituted this action in the Supreme Court of the State of New York seeking to recover \$1,000,000 from Petitioner Continental Casualty Company, an Illinois corporation, for products liability losses purportedly covered by an Excess Liability Insurance Policy issued to it by Petitioner. Pursuant to 28 U.S.C. 1441, Continental removed the case to the United States District Court for the Southern District of New York on the ground of diversity of citizenship. See 28 U.S.C. 1332(a).

Both parties agreed that New York law applied to define the operative terms of the policy. The district court invoked New York law, as required by *Erie*, but applied that law differently from the way the New York Court of Appeals previously had applied it. Petitioner appealed to the Second Circuit for review of the district

court's application of New York law. The Second Circuit, deviating from the principles followed by the other courts of appeals, refused to examine State law and instead apparently construed the contract under principles of federal common law.

The proceedings in the district court established that, among other activities, Champion purchased vinyl-covered plywood panels from a sub-contractor and sold them without modification to many manufacturers for installation in the interior of houseboats, house trailers, motor homes and campers. Champion normally sold the panels to the manufacturers in small lots, as their production schedules required.¹ The panels were shipped either from stocks maintained at Champion's branches or directly by the sub-contractor (J.A. 159).²

Many of the panels sold by Champion in 1969 and 1970 proved to be defective. After installation, the vinyl covering began to peel off or delaminate from the plywood backing (App. A, *infra*, pp. 2a-3a; App. D, *infra*, p. 19a). Over 1400 vehicles manufactured in many different states over a period of several months by at least twenty-six different firms were damaged by the defective panels. No vehicle sustained more than \$5,000 in property damage. Champion eventually settled the claims of the vehicle owners for an amount in excess of \$1.5 million and looked to its insurers for indemnification (App. A, *infra*, pp. 3a-4a).

Champion was partially protected against property damage claims by two insurance policies. The first, a

¹ For example, one manufacturer obtained its panels through approximately 105 separate purchases between January 1969 and March 1970 (App. D, *infra*, p. 19a n.1).

² All references to "J.A." refer to the Joint Appendix filed in the court of appeals.

comprehensive general liability policy written by Liberty Mutual Insurance Company, included products liability losses within its coverage. It provided \$100,000 in coverage for each "occurrence" of property damage, up to a \$200,000 aggregate limit, and subject to a \$5,000 deductible "per occurrence" (App. A, *infra*, p. 3a; J.A. 490a, 510-511). The second policy, issued by Petitioner, provided excess liability insurance over and above the primary coverage of the Liberty Mutual policy (J.A. 447, 459-467). It provided coverage of up to \$1,000,000 for "any one occurrence" of property damage, subject to a \$1,000,000 annual limit (App. A, *infra*, p. 3a). Thus, Champion itself absorbed the first \$5,000 of loss per occurrence of property damage, Liberty Mutual assumed the next \$100,000 of damage, and Continental contracted to assume any loss above those amounts up to an additional \$1,000,000 for a single occurrence.

Continental's excess liability policy incorporated by reference the terms of the underlying Liberty Mutual policy for purposes of defining which losses were covered by Continental. As the district court correctly noted, the provisions of the Liberty Mutual policy are standardized and are used by many companies in comprehensive liability insurance policies in force throughout the United States (App. D, *infra*, p. 24a).³ The policy provided that the insurer would pay all sums for property damage "caused by an occurrence" up to the limit of the policy, subject to the \$5,000 deductible per occurrence

³ Such standardized products liability insurance provisions cover an enormous volume of manufactured goods transported in interstate commerce and sold in all states. Indeed, the writing of such products liability insurance itself has a substantial effect on interstate commerce. See *United States v. South-Eastern Underwriters Ass'n.*, 322 U.S. 533, 540-541 (1944). In 1975, the total net premiums collected for commercial products liability insurance equalled an estimated \$1.6 billion. United States Department of Commerce, *Product Liability Insurance-Assessment of Related Problems and Issues* 40 (March 1976).

(App. A, *infra*, p. 3a; J.A. 491). The term "occurrence" was defined to mean

an accident, including injurious exposure to conditions, which results . . . in bodily injury or damage neither expected nor intended from the standpoint of the insured (App. D, *infra*, pp. 20a-21a; J.A. 493, 500).

For purposes of determining the limit of the insurer's liability, the policy stipulated that

[all] property damage arising out of continuous or repeated exposure to substantially the same general conditions . . . shall be considered as arising out of one occurrence (App. A, *infra*, p. 5a; J.A. 498-499).

The policy contained no geographical limitation on its coverage within the United States (J.A. 493). Similar contracts to this effect are in force nationwide.

Petitioner conceded that the damage resulting from the defective panels constituted property damage within the meaning of the Liberty Mutual policy. Therefore, the pivotal issue was whether the hundreds of delaminations of plywood panels, independently detected in many states, constituted but one occurrence of harm, or whether the damage suffered by each of those vehicles was a separate occurrence under the contract. Because no vehicle suffered more than \$5,000 in damages, Champion would recover nothing under either policy, by operation of the deductible clause, if each incident of delamination were considered a separate "occurrence."

In the district court,⁴ Petitioner argued that under settled New York law, each instance of delamination constituted a separate "occurrence" because the injuries occurred at different times and at different places and because no one instance of delamination caused any other. Construing New York law differently, the district

⁴ The parties had agreed that New York law governed the interpretation of the contract (App. A, *infra*, p. 7a n.5).

court held, as Champion argued, that the insured must prevail if the policy could reasonably be construed in its favor. It further found that the language of the policy was "ambiguous" as to whether each delamination should be considered a separate occurrence thereunder (App. D, *infra*, p. 24a). The court concluded that the interpretation of the contractual definition urged by Champion—that there had been but one "occurrence" of harm—"may not be the only reasonable interpretation, but it is a reasonable one" (*idem.*). The court therefore entered judgment against Petitioner for \$1,000,000 plus interest (App. E, *infra*, pp. 27a-28a).

Petitioner appealed, challenging the district court's construction of New York law. The court of appeals, one judge dissenting, affirmed without applying State law. The majority conceded that the term "occurrence" had been construed in different ways in prior State and federal diversity cases requiring interpretation of that term in similar insurance policies. But, examining the policy "in light of the business purposes sought to be achieved by the parties" (App. A, *infra*, p. 6a), it found that the contract was not ambiguous. Accordingly, it held that it need not consider the laws of any State in determining the parties' rights (*id.*, pp. 7a n.5, 8a).

Turning to the merits, the majority held that there had been but one "occurrence" within the meaning of the policy. It ruled that by basing liability on a "per occurrence" rather than on the optional "per claim" basis, the parties intended to gauge coverage not "on the basis of individual accidents giving rise to claims, but rather on the underlying circumstances which resulted in the claim for damages" (*id.*, p. 6a (emphasis supplied)). The majority supplied two definitions of the single "occurrence" it found. First, it suggested that the occurrence was Champion's "delivery of defective panels" (*id.*, p. 4a). Second, it stated that the damage arose from continuous or repeated exposure to the same

general conditions, but offered only the following elliptical description of those conditions (*id.*, p. 7a):

Exposure there was, when Champion sold the paneling, and during this process, it was continuing and repeated.

The dissenting judge agreed that the insurance policy was not ambiguous but reached the opposite conclusion as to its meaning. He observed that Champion's selection of a "per occurrence" basis over a "per claim" basis of coverage did not demonstrate that the parties intended that all injuries stemming from a single, ultimate cause should be considered as one "occurrence" of harm. As he correctly found, it was wholly fortuitous that under the circumstances of this case, each event causing damage gave rise to only one claim (*id.*, pp. 9a-10a). He rejected the notion that the delivery of defective panels itself could be considered a single "accident" or the "same general condition", repeated exposure to which caused injury, because Champion had made at least twenty-six, if not far more, separate deliveries. He also argued that the majority's observation that Champion had suffered "exposure" was nothing more than a play on words: When it sold the panels, Champion "exposed" itself to legal liability, but that event did not constitute physical exposure to some injurious phenomenon, such as radiation, heat or moisture, which traditionally is regarded as a single occurrence under this contractual definition (*id.*, pp. 10a-11a).

Moreover, the dissent observed that because of the small monetary amount of each claim, the insurer and the insured found themselves advancing arguments normally presented by the other side in accident insurance litigation. The insurer usually wants injurious events to be construed as a single occurrence, so that its payments under the policy will be limited. It is normally in the insured's interest to argue for multiple occurrences so that more consumer claims will be adequately covered. The dissent expressed the concern that the precedential

value of the definition of these standardized terms advanced by the majority on these peculiar facts might lead to an unjustifiable reduction in insurance benefits available to offset consumer claims in ordinary products liability cases (*id.*, pp. 12a-13a).

Neither the district court, the court of appeals nor the New York court upon whose decisions the parties relied ever considered the effect of its decision on interstate commerce in insurance or in the insured goods.

REASONS FOR GRANTING THE WRIT

This case involves consideration of the responsibility of inferior federal courts in diversity cases to apply State law and to avoid creating substantial impediments to interstate commerce. The court of appeals has interpreted a term of art in a standardized insurance policy in use nationwide without either applying the law of the State in which the action arose or considering whether its decision (or the decisional law of that State) would inflict any burden on interstate commerce in insurance or the insured products. Moreover, this case involves a fundamental and original question regarding the source of the law to be applied by the inferior federal courts in diversity cases where application of State decisional law could create a substantial burden on interstate commerce. This question is particularly ripe for consideration by the Court at this time, when the utility and the appropriate future role of diversity jurisdiction are being freshly considered⁵ and increasing reliance is being placed on the sensitivity of State courts to federal constitutional interests.⁶ The contested term of art determines whether

⁵ See, e.g., Burger, *Annual Report on the State of the Judiciary*, 62 A.B.A.J. 443, 444 (1976); Friendly, *Federal Jurisdiction: A General View* 3-4, 139-152 (1973); cf. H.R. 761, 95th Cong., 1st Sess. (1977).

⁶ See *Stone v. Powell*, 428 U.S. 465, 493-494 n. 35 (1976); *Swain v. Pressley*, No. 75-811, decided March 22, 1977, slip op. at 10-11; cf. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 341-344 (1816); THE FEDERALIST No. 82.

persons liable for the defective manufacture of mass produced goods which have inflicted injury on multiple consumers can recover from their insurers. Therefore, this case potentially is of practical and pervasive importance, both in terms of the administration of justice and the constitutional requirement that State laws not burden interstate commerce in the absence of a substantial State interest.

1. In the exercise of their diversity jurisdiction, federal courts generally enforce State-created rights. They therefore normally apply the laws of the appropriate State, including the conclusive determinations of the highest court of that State as well as its statutory law. *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938); 28 U.S.C. 1952. But the court of appeals expressly refused to apply the law of any State in interpreting this insurance policy and thereby denied Petitioner due process of law.⁷

Both parties conceded, and the district court found, that the law of New York governed this diversity action. The court of appeals nevertheless ruled that it was not required to follow the law of any State because the underlying insurance policy was unambiguous on its face. Interpreting Champion's selection of a "per occurrence" basis for the deductible in light of an unidentified body of principles of contractual construction, the court found that the parties did not intend "to gauge coverage on the basis of *individual accidents* giving rise to claims," but rather on the basis of all claims Champion became legally obligated to pay because of property damage (App. A, *infra*, p. 6a & n.3 (emphasis supplied)).

⁷ The court of appeals stated (App. A, *infra*, p. 8a):

we need not consider the applicable state rules for the interpretation of insurance policies which were discussed by the court below on the assumption that the policy in question was ambiguous.

See also App. A, *infra*, p. 7a n.5.

However, the underlying policy explicitly defines an "occurrence" giving rise to a right of recovery in terms of an "accident" (App. D, *infra*, pp. 20a-21a). And despite its familiarity in other contexts, when used in liability insurance policies, the word "accident" is a term of art whose meaning cannot be determined on its face. State courts have adopted at least three different definitions of "accident," depending upon which of three conflicting theories of causation they follow.* *Arthur A. Johnson Corp. v. Indemnity Insurance Co.*, 7 N.Y.2d 222, 227-229, 196 N.Y.S.2d 678, 681-684, 164 N.E.2d 704 (1959); see Annotation, 55 A.L.R.2d 1300 (1957). These theories can produce substantially different results when applied to the same set of facts. *Johnson, supra*, 196 N.Y.S.2d at 683-684. Therefore, a federal court required to interpret this term in a diversity case must resort to the law of the State in which the action arose.

The precise question involved in this case has been authoritatively resolved under New York law. In interpreting the meaning of "occurrence" in a liability insurance policy, the New York Court of Appeals has expressly rejected the causation theory adopted by the majority below, that there is but one "occurrence" simply because all damages can be traced back to a single, ultimate act of negligence." *Hartford Accident & Indemnity Co. v.*

* Because the courts have been in persistent disagreement over the causation principles properly applied where an error at one point in a multi-tiered distribution system produces discrete injuries to multiple consumers in succeeding stages, the insurance industry so far has been unable to eliminate this conflict by redrafting the standard policy terms. With each attempt to clarify the definition of the "accident" or "event" that triggers the insured's right to compensation, the same conflict of authority has reappeared. Compare *Maurice Pincoffs Co. v. St. Paul Fire & Marine Ins. Co.*, 447 F.2d 204 (5th Cir. 1971), with *Union Carbide Corp. v. Travelers Indemnity Co.*, 399 F. Supp. 12 (W.D. Pa. 1975).

* Moreover, as the dissent correctly noted, the majority erred in applying its own theory to the facts of this case. Whether the "general condition" giving rise to liability is the "sale" or the

Wesolowski, 33 N.Y.2d 169, 173-174, 350 N.Y.S.2d 895, 899, 305 N.E.2d 907 (1973). Rather, it follows the rule that there are as many "occurrences" as "events of an unfortunate character that [take] place without one's foresight or expectation." *Id.*, quoting from *Johnson, supra*, 196 N.Y.S. 2d at 683. It calculates the number of separate "events" by determining whether the instances of damage were remote in time and space from each other and whether one incident of injury caused another. *Idem*; see *Sturges Mfg. Co. v. Utica Mutual Life Ins. Co.*, 37 N.Y. 2d 69, 371 N.Y.S. 2d 444, 332 N.E. 2d 319 (1975). Accordingly, since there was no allegation of a spatial or temporal relationship among the scattered instances of delamination or that any one instance of delamination caused another, Petitioner would not have been liable for any amount under its policy if the court below had followed this approach (see App. A, *infra*, p. 4a). Cf. *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945). We submit that if the Second Circuit had looked to and followed New York law, it would have recognized the district court's error and reversed.

Erie and its progeny establish that in the face of the determination of an issue by the courts of the appropriate State, the Constitution requires a federal court adjudicating a diversity case to adopt and apply the State rule. The court of appeals therefore violated a basic canon of our federal system of government, and decided an important issue of federal law in conflict with the decisions of this Court, by adopting its own theory of causation in construing the provisions of this insurance policy.

"delivery" of panels, the uncontroverted facts show that Champion made at least twenty-six separate sales or deliveries of plywood panels. Thus, even under the court of appeals' approach, there were at least twenty-six, if not many more, "occurrences" to which the deductible applied.

2. The decision below also conflicts with the decisions of at least two other courts of appeals which have been required to construe the meaning of "occurrence" in similar liability insurance policies. They have held that the question is governed by the law of the appropriate State. See *Maurice Pincoffs Co. v. St. Paul Fire & Marine Ins. Co.*, 447 F.2d 204 (5th Cir. 1971); *Hamilton Die Cast, Inc. v. United States Fidelity & Guaranty Co.*, 508 F.2d 417, 420 (7th Cir. 1975); *contra*, *Union Carbide Corp. v. Travelers Indemnity Co.*, 399 F. Supp. 12 (W.D. Pa. 1975). The decision below also conflicts in principle with numerous decisions of other courts of appeals holding that the synonymous operative term "accident" in such policies must be construed under State law. See, e.g., *Elston-Richards Storage Co. v. Indemnity Insurance Co.*, 194 F. Supp. 673 (W.D. Mich. 1960), *aff'd*, 251 F.2d 627 (6th Cir. 1961). This Court should, therefore, in the exercise of its supervisory power over the administration of justice, grant certiorari to resolve this conflict.

The grant of the writ is especially appropriate in this case because the court of appeals' decision could impose a substantial burden on interstate commerce. Insurance companies which do business in several states operate under inconsistent bodies of statutory and decisional law which often will produce different results on the same set of facts. Despite this conflict, the insurance industry has been able to establish a certain degree of predictability in the amount of its exposure to liability by selecting the State whose laws will govern the interpretation of a policy, either by express choice of law or by careful orchestration of contacts with a jurisdiction.

In the instant case, however, the Second Circuit has upset these commercial expectations. Deviating from the holdings of other courts of appeals, the court below has announced that the operative terms of insurance policies

within its jurisdiction will not be construed under State law, and has, instead, applied some unidentified body of federal common law principles. The Second Circuit includes the States of New York and Connecticut, which are the principal places of business of many major insurance companies as well as two of the country's leading manufacturing States. The effect of the decision below is to introduce uncertainty as to the source of commercial law to be applied to contracts covering a significant fraction of the country's commerce. The disruptive effect of this decision on insurance carriers and its correlative effect on the insureds will significantly burden that commerce. Moreover, by presenting the prospect that different bodies of law would govern in State courts and in federal diversity courts, the decision below threatens to reintroduce the vice of forum shopping that *Erie* was intended to eliminate. Accordingly, this case fully warrants the grant of certiorari.

Indeed, given the plain inconsistency of the decision below with *Erie*, we respectfully submit that this case is ripe for summary reversal and remand to the court of appeals for application of State law.

3. In addition, the court of appeals' decision leaves open the question whether it properly could have refused to follow *Erie* because application of State decisional law under these circumstances would have created an unconstitutional obstacle to interstate commerce. Whether the Commerce Clause introduces an independent constitutional limitation on the application of the *Erie* doctrine, which itself is constitutionally based (304 U.S. at 77-78), is a question of great importance to the federal system of government.

The Commerce Clause of the Constitution prohibits the States from impeding substantially the free flow of interstate commerce. See, e.g., *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945); *Gibbons v. Ogden*, 22 U.S. (9

Wheat.) 1 (1822). This Clause imposes a constitutional obligation on the federal courts not to enforce State laws which would significantly interfere with that commerce. See *Southern Pacific Co. v. Arizona*, *supra*. This obligation serves to limit the power of the States even if, as in the insurance field, Congress has not legislated in a particular area. *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366, 370-371 (1976); *Freeman v. Hewitt*, 329 U.S. 249, 252 (1946); see 15 U.S.C. 1011-1012.

The decisions of the highest court of a State in construing and enforcing its laws are necessarily considered the acts of the State for purposes of determining whether that action violates the federal Constitution. See *American Federation of Labor v. Swing*, 312 U.S. 321 (1941); *Cantwell v. Connecticut*, 310 U.S. 296, 307-311 (1940); *Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226, 234-235 (1897). As a practical matter, burdens on interstate commerce may arise equally from decisions of State courts adjudicating private contractual disputes as well as from their more familiar source, the implementation of State statutes. Cf. *Shelley v. Kraemer*, 334 U.S. 1, 12-23 (1948). If in a diversity case a federal court were to apply a State decision adversely affecting interstate commerce, the federal court itself would obstruct that commerce. Accordingly, there is unavoidable tension in such cases between the responsibility of an inferior federal court under the Commerce Clause and what this Court held in *Erie R.R. v. Tompkins*, *supra*, to be the constitutional obligation of the federal courts to apply State decisional law in diversity matters. In these circumstances, the Supremacy Clause requires that the conflicting State law yield to the imperative federal interest in preventing burdens on interstate commerce.

The potential effect of the court of appeals' ruling on interstate commerce is apparent on the face of its

opinion. Its decision has aggravated the existing conflict of authority on the meaning of the standardized term "occurrence". This conflict in interpretation substantially reduces the degree of certainty with which products liability insurers can predict the frequency and severity of the losses to which they are exposed. The premiums on such policies simply represent a probability estimate of future claims and expenses. See United States Department of Commerce, *Final Report of the Interagency Task Force on Products Liability Insurance—Insurance Study 1-4 to 1-5* (March 1977). The decision below makes it even more difficult for the industry accurately to calculate the proper premium to charge and for the manufacturer to determine the optimum amount of products liability insurance it should carry. This conflict also increases the risk that consumers injured by defective products would not be able to obtain full compensation for their damages.¹⁰ Under these circumstances, the precedential value of the court of appeals' interpretation of "occurrence" must have a significant effect on interstate commerce.

The court below did not consider whether application of State law to the underlying insurance policy would impose a substantial burden on interstate commerce. Nor did it consider whether any countervailing State interest outweighed the national interest in the unhampered flow of interstate commerce. It thereby failed to satisfy the only possible constitutionally sufficient justification for deviating from the normal rule of decision in diversity cases.

This Court has noted in controversial contexts that State courts have the same obligation and capability as

¹⁰ As the dissenting judge below suggested, the majority's result-oriented definition of "occurrence", under the unusual circumstances produced by the operation of the \$5,000 deductible, will greatly confuse the degree of protection available to the insured (and thus to the consumer) in the vast majority of products liability cases.

federal courts to uphold the federal Constitution and to balance federal constitutional interests against local laws and policy. See n. 6, *supra*. A grant of the petition in this case would afford the Court an unencumbered opportunity to expound upon these considerations in a commercial context and to instruct State and inferior federal courts in the appropriate method of weighing federal constitutional interests against State concerns, in order to reduce the number of occasions in the future in which federal courts would be required to become involved in the adjudication of State-created rights.¹¹

Under these circumstances, the petition for a writ of certiorari should be granted, and the case should be remanded to the court of appeals either for application of State law or for development of facts which will permit an informed judgment whether the definition of "occurrence" adopted by New York would impose such a substantial burden on commerce that the federal courts are not bound to apply that law in this case.

But even if the Court were to conclude that the court of appeals did not violate *Erie* in adopting its own definition of "occurrence" without reference to State law, this case nonetheless warrants further review in order to consider the responsibility of federal courts, acting pursuant to a "transcendental body of law"¹², not to

¹¹ The need for such instruction in performing the balancing process is demonstrated by cases such as *Wisconsin v. Milwaukee Braves, Inc.*, 31 Wis.2d 699, 144 N.W.2d 1, 18, cert. denied, 385 U.S. 990 (1966) (three of eight participating Justices voting to grant certiorari), in which the Wisconsin supreme court refused, despite a legitimate State interest, to apply its pioneer antitrust law to concerted anti-competitive conduct because of its perception of the potential effects of its application on interstate commerce. See *Southern Pacific v. Arizona*, *supra* (insufficient State interest supporting train-length statute); cf. *Raymond Motor Transport, Inc. v. Rice*, 417 F. Supp. 1352 (W.D. Wis. 1976), probable jurisdiction noted, No. 76-558, March 7, 1977.

¹² *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting).

create additional obstacles to commerce. The majority adopted a definition of a term of art in products liability policies in use nationwide without considering whether the resulting conflict of authority generated an unjustified burden on interstate commerce in insurance. Rather than helping to ameliorate the burden of this conflict of commerce, the court of appeals' decision has only worsened the current impasse. But a federal court purporting to interpret such a standard contractual term pursuant to general common law principles should consider the impact of its decision on the uniformity of interpretation conducive to the free flow of commerce. In such circumstances, a federal court has an obligation associated with the Constitution to help resolve, and not to exacerbate, a conflict of authority between circuits and among the States.

Similar problems could arise in diversity cases involving other industries if federal courts are permitted to apply general common law or equitable principles to choose among conflicting lines of State court authority. We respectfully submit that fresh consideration of the responsibilities of federal courts to the nation's commerce in such circumstances would be constructive and timely.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

LOUIS F. OBERDORFER
JOHN F. COONEY

Of Counsel:

RONALD A. JACKS

*Attorneys for Petitioner
Continental Casualty
Company*

APRIL 1977.

APPENDICES

1a

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 956—September Term, 1975

(Argued May 11, 1976 Decided December 9, 1976)

Docket No. 75-7664

CHAMPION INTERNATIONAL CORPORATION,
Plaintiff-Appellee,

—against—

CONTINENTAL CASUALTY COMPANY,
Defendant-Appellant.

Before: MOORE and TIMBERS, *Circuit Judges*, and NEW-
MAN, * *District Judge.*

Appeal from a judgment in the amount of \$1,000,000 plus interest, entered by the United States District Court for the Southern District of New York, Hon. Gus J. Solomon, *Judge* (District Judge for the District of Oregon, sitting by designation), after a non-jury trial. The Court of Appeals affirmed, holding that, under the spe-

* Honorable Jon O. Newman, United States District Judge for the District of Connecticut, sitting by designation.

cific provisions of the insured's umbrella excess insurance policy, the sale of defective vinyl panels manufactured by a single source and sold by the insured to various customers constituted a "single occurrence" within the meaning of the policy.

Affirmed.

SEYMOUR SHAINSWIT, Esq., New York, N.Y. (Kronish, Lieb, Shainswit, Weiner & Hellman, Martin Teicher, of counsel), *for Plaintiff-Appellee*.

JACK HART, Esq., New York, N.Y. (Hart & Hume, Cecil Holland, Jr., of counsel), *for Defendant-Appellant*.

MOORE, *Circuit Judge*:

Continental Casualty Company ("Continental") appeals from a judgment of \$1,320,139.64 (\$1,000,000 plus interest) entered against it by the district court, after a non-jury trial, and in favor of Champion International Corporation ("Champion"). Jurisdiction exists under 28 U.S.C. § 1331.

This action involves the quite frequently perplexing problem presented in endeavoring to construe clauses in insurance policies. The policies in issue here were issued by Continental and Liberty Mutual Insurance Company ("Liberty Mutual") to Champion, to cover products liability losses which might be sustained by Champion. The material facts giving rise to the insurance claim underlying this action are not in serious dispute.

I.

Champion, in 1969 and 1970, amongst many other products, sold vinyl-covered paneling to manufacturers of houseboats, house trailers, motor homes and campers.

It purchased the paneling from Continental Vinyl ("Vinyl"). Not long after the panels had been installed in the various vehicles they commenced to delaminate, or in less technical parlance, to split apart. Naturally, claims were asserted against Champion for damages incurred, which in turn caused Champion to look to its insurance coverage.

Champion had two insurance policies: one, written by Liberty Mutual, covered products hazards and was in the amount of \$100,000 for each "occurrence" (\$200,000 aggregate) and subject to \$5,000 deductible "per occurrence" for property damage liability; the second, written by Continental, an "Umbrella Excess Third Party Liability Policy" ("Umbrella Excess policy"), the policy period being three years from November 30, 1967 to November 30, 1970, provided for excess coverage over Champion's underlying insurance (namely, Liberty Mutual's policy) of \$1,000,000 for "any one occurrence" and \$1,000,000 in the aggregate for each annual period.

Thus, from a business point of view, Champion had assumed as a self-insurer the first \$5,000 of any loss (the \$5,000 deductible) it had the Liberty Mutual policy for the next \$100,000 (\$200,000 aggregate); and above these amounts, it had the Continental Umbrella Excess policy for \$1,000,000.

As found by the trial court, some 1400 vehicles manufactured by some 26 different customer companies of Champion were damaged by the defective panels during the policy period.

Champion employed Liberty Mutual to investigate and settle such claims on a fee basis. As of September 13, 1974, Champion had paid Liberty Mutual \$1,513,116.82 for property damage settlements which Liberty had effected. No question is raised as to the reasonableness of those settlements.

The trial proceeded on the basis of first determining liability. Once this was determined in plaintiff's favor, damages were easily ascertained because they were in excess of the upper limits of Continental's policy. Judgment thus was awarded for \$1,000,000 plus interest.

II.

We are confronted with a situation in which the trial court, finding in favor of the plaintiff, said "Each party contends that the language of the policies is clear and unequivocal and supports its contentions", but addressing the sole issue, namely, "whether there was one occurrence which proximately resulted in damage to many vehicles, or whether the damage suffered by each of those vehicles was a separate occurrence", found in favor of the plaintiff because it held "that the contested language is ambiguous"; that plaintiff's interpretation was a "reasonable one"; and that that "is all plaintiff is required to prove". See Joint appendix at 159-165.

The sole appellate issue is the scope to be attributed to the word "occurrence" in the policies.¹ If each occurrence means each of the 1400 individual installations of the defective panels, there is no liability under the Liberty Mutual policy because it is conceded that the damage in each instance did not exceed \$5,000 and hence, would come within the \$5,000 deductible provision. Nor would there be liability under the Umbrella Excess policy, for the same reason. If, on the other hand, the cause of Champion's damage, namely, the delivery of defective panels, is the "occurrence", then this delivery in the aggregate resulted in losses totalling some \$1,600,000 of which \$1,100,000 would be covered by the two insurance

¹ Appellant's arguments respecting the amount of damages awarded is inextricably bound up in the issue of whether one, or several, "occurrences" took place. The question of damages is factual, and is treated further in this opinion at p. 6049.

policies (\$100,000 under the Liberty Mutual policy and \$1,000,000 under the Umbrella Excess policy).²

Since Continental's policy was intended to cover excess liability, the question is presented: excess over what? Excess could only arise if coverage under Liberty Mutual's underlying policy was inadequate to compensate Champion for its losses. Therefore, reference must first be made to the appropriate provisions of the Liberty Mutual policy.

Under the Liberty Mutual policy, Liberty Mutual was to pay for property damage "caused by an occurrence" to a maximum of \$100,000 payment for any one occurrence. Joint appendix at 491, 499, 510. To determine how the maximum was to be applied, the policy provided that "all . . . property damage arising out of continuous or repeated exposure to substantially the same general conditions . . . shall be considered as arising out of one occurrence." Joint appendix at 498-9.

Continental's policy indemnified Champion for property damage (defined as "ultimate net loss") caused by or arising out of "each occurrence". Joint appendix at 448. Ultimate net loss was stated to be the "total sum which the Insured or any company as his insurer becomes obligated to pay by reason of [p]roperty damage. . . .". Joint appendix at 451.

As previously mentioned, this appeal centers around the question of what constitutes an "occurrence". The trial judge believed that the loss and the compensation therefor were determined on the basis of language in the

² Continental represents in its reply brief that "Champion has recovered over \$1 million from Continental Vinyl's insurer and the manufacturers of the vinyl film and of the adhesive used in the panels in an action in California based on exactly the same facts as form the basis for the instant action." Reply brief at 12. Whatever rights Continental may have by way of subrogation or otherwise are not before this Court on this appeal.

respective policies which was ambiguous. We would prefer to examine the policies in light of the business purposes sought to be achieved by the parties and the plain meaning of the words chosen by them to effect those purposes.

We can immediately reject Continental's argument that there were 1400 separate occurrences. There could have been 1400 separate *claims* presented by the owners of the damaged vehicles against the 26 manufacturers; those are not before us. Such claims might have been funneled through the 26 manufacturers to Champion and Champion could have turned to the panel manufacturer, Vinyl, for protection, which it apparently did. However, Champion, as the seller of the defective paneling, was primarily liable and had paid out almost \$1,600,000 on this liability. This amount was a sum which Champion (the insured) became *obligated to pay* by reason of *property damage* and hence, was encompassed within the Umbrella Excess policy's term "ultimate net loss".

Important in the interpretation of "occurrence" is Champion's selection, under the heading "Amount and basis of Deductible" in the Liberty Mutual policy, of a "per occurrence" basis (and its corresponding rejection of a "per claim" basis). This indicates that the policy was not intended to gauge coverage on the basis of individual accidents giving rise to claims, but rather on the underlying circumstances which resulted in the claim for damages.³ Since the terms of the Liberty Mutual

³ We agree with the district court in *Stauffer Chemical Co. v. Insurance Co. of North America*, 372 F. Supp. 1303, 1307 (S.D.N.Y. 1973), which held in an analogous situation, that:

"The use of the term 'occurrence' . . . rather than the more restrictive term 'accident' is consistent with an intention to afford coverage for 'all sums which the insured shall become legally obligated to pay' regardless of how such liability arose."

The same analysis applies with equal force to the use, in the policies at bar, of the term "occurrence" instead of the term "claim".

policy were made controlling over the Umbrella Excess policy,⁴ this reading of the Liberty Mutual policy applies equally to that issued by Continental.

Although "occurrence" has received different interpretations in the many cases cited by the respective parties,⁵ the definition given that term by the Umbrella Excess policy is controlling unless it is ambiguous (and we find no ambiguity here). Exposure there was, when Champion sold the paneling, and during this process, it was continuous and repeated. There is no dispute that damage resulted which was unexpected. Whether the property damage occurred *during* the policy period is a factual question which was resolved in Champion's favor below;⁶ this finding is not subject to reversal unless it is clearly erroneous.⁷ We have examined the record and find that the evidence presented to the district court

⁴ Endorsement No. 17 of the Umbrella Excess policy reads as follows:

"It is understood and agreed that in the event of loss for which the assured has coverage under the Underlying Insurance, the excess of which would be recoverable hereunder, except for terms and conditions of this policy which are not consistent with the underlying, then, notwithstanding anything contained herein to the contrary, this policy shall be amended to follow the terms and conditions of the applicable underlying insurances in respect of such loss." Joint appendix at 487.

⁵ See, e.g., *Hartford Acc. & Ind. v. Wesolowski*, 33 N.Y.S. 2d 169 (1973); *Sturges Mfg. Co. v. Utica Mut. Inc. Co.*, 37 N.Y. 2d 69 (1975); *Aetna Casualty and Surety Co. v. Martin Bros. Container and Timber Products Corp.*, 256 F. Supp. 145 (D. Ore. 1966).

Both parties in the instant case are agreed that New York law governs the controversy. However, it is not necessary for us to resort to state rules governing the construction of ambiguous insurance policies since, in our view of the case, the terms of the policies in question are not ambiguous.

⁶ Opinion of the district court, joint appendix at 159.

⁷ See F.R. Civ.P. 52(a).

fairly supports that court's conclusion; accordingly, the district court's finding will not be disturbed.*

Since we conclude that the plain language of the Umbrella Excess policy supports the liability of Continental on the insurance policy, we need not consider the applicable state rules for the interpretation of insurance policies which were discussed by the court below on the assumption that the policy in question was ambiguous.

For the foregoing reasons, the judgment of the district court is affirmed.

NEWMAN, *District Judge* (dissenting):

While I confess to some sympathy with the majority's effort to construe the terms of the insurance policy in a way that provides payments to the insured, I dissent from their conclusion because (1) in my view it is incorrect, and (2) unless the decision is limited to its precise facts, it can in the future lead to the *denial* to many insureds of substantial payments to which they are entitled.

1. We agree that the issue is whether in the circumstances indisputably established by the record there has been one or more than one "occurrence" within the meaning of the Liberty Mutual policy. We also agree that this issue can be resolved by the plain meaning of the words in the policy. We reach opposite conclusions as to that plain meaning.

The policy defines "occurrence" to mean "*an accident, including injurious exposure to conditions, which results during the policy period in bodily injury or property damage neither expected nor intended from the standpoint of the insured . . .*" (Emphasis added). The policy

* See generally, 5A J. Moore, *Federal Practice* ¶ 52.03 (1975 ed.).

also provides that for purposes of determining the limit of Liberty Mutual's liability, all personal injury or property damage "arising out of continuous or repeated exposure to substantially the same general conditions" shall be considered as arising out of one "occurrence." The majority implicitly assumes, and I agree, that this further definition of "occurrence" to mean "continued or repeated exposure to substantially the same general conditions" provides the meaning for construing the deductible clause, even though it applies in terms only to determining the limit of Liberty Mutual's liability.

On various occasions Champion purchased quantities of vinyl-covered paneling. It made a series of sales of this paneling in small lots over a period of several months to 26 different manufacturers. The paneling was ultimately installed, or made into products that were installed, in numerous vehicles. On approximately 1400 occasions the paneling delaminated, giving rise to a single claim for property damage for each instance of a product or vehicle damaged by the delamination.

The majority's initial step toward its conclusion of a single occurrence is to reject the possibility of 1400 different occurrences as somehow inconsistent with the fact that there were 1400 different claims. Reliance is placed on the insured's selection of a "per occurrence" rather than a "per claim" basis for computing the deductible. Of course occurrences and claims are not necessarily the same in number, but they are not necessarily different either. The occurrence is the event that gives rise to the claim. It is entirely possible to have one claim per occurrence, or, if the occurrence is of the sort where one event causes injury to several persons or to property owned by several persons, to have several claims per occurrence. The fact that the insured selected a "per occurrence" basis is of no help in determining whether in the circumstances of this case there has been one

occurrence, or several occurrences, or a number of occurrences precisely equal to the number of claims.

Having rejected the possibility of 1400 occurrences, the majority then uses two different approaches to conclude that the facts of this case constitute one occurrence within the meaning of the Liberty Mutual policy. First, it suggests that the single occurrence is "the delivery of defective panels." Slip op. at 6048. Even if a delivery of defective panels could be considered to be "an accident" or "the same general conditions" exposure to which on a continuous and repeated basis gave rise to the damage, the undeniable fact is that there was not a single delivery. There were at least 26 deliveries to the 26 different manufacturers, and, in view of the periodic sales in small lots, very likely far more than 26 deliveries.

Secondly, the majority endeavors to identify a single occurrence that fits the policy's reference to "property damage arising out of continuous or repeated exposure to substantially the same general conditions." In what seems more like a pun than a construction, the majority observes: "Exposure there was, when Champion sold the paneling, and during this process, it was continuous and repeated." Slip op. at 6051. When Champion sold the paneling, there was created "exposure" to legal liability, not a single occurrence of continuous or repeated exposure to substantially the same general conditions that cause the damage.

In my view the "exposure to conditions" clause has doubtful application to the type of damage that happened in this case, and even if it applies, there would still be 1400 occurrences, not one. That clause concerns damage that occurs when people or property are physically exposed to some injurious phenomenon such as heat, moisture, or radiation. The clause simply broadens the policy's definition of "occurrence" beyond the word "accident" to include a situation where damage occurs (con-

tinuously or repeatedly) over a period of time, rather than instantly, as the word "accident" usually connotes. Moreover, the "exposure" clause concerns continuous or repeated exposure to conditions existing at or emanating from one location. Indeed, Continental's excess coverage policy, which also defines "occurrence" as an event or a continuous or repeated exposure to conditions, specifically provides that "exposure to substantially the same general conditions existing at or emanating from each premises location shall be deemed to be one occurrence."

To apply the "exposure to conditions" clause to delamination damage puts considerable strain on the words "exposure" and "conditions." The insured contends that the "conditions" to which the property suffering damage was exposed were the defective panels, and that the "exposure" was not the process of selling the panels, as the majority suggests, but rather the installation of the panels. I have difficulty with the concept of a product suffering damage by exposure to its principal component. But even if delamination damage to a product made of laminated paneling can be said to result from "exposure" of the product to the "conditions" of the paneling, that construction of the "exposure" clause does not help decide whether there was one occurrence or 1400. Under this construction, if delamination occurred at a single location, all resulting damage from that delamination would be one occurrence, no matter how gradually the damage was sustained.¹ But 1400 delaminations occurring at 1400 different times and places are 1400 occurrences.

The question is whether an "occurrence" within the meaning of a distributor's product liability policy means

¹ It is equally clear that there can be a single occurrence if property at various locations is damaged by continuous or repeated exposure to a source of injury at a single location, as when one source of radiation causes gradual damage to many items at different places.

the event in which the defect in the product causes damage, or some earlier event in the distribution process. Or, to put it another way, an occurrence means one event, not several events, and the question here is which event is the occurrence contemplated by the policy definition. The cases have consistently construed "occurrence" or "accident" in liability policies to mean the event for which the insured becomes liable, and not some antecedent cause of the injury. See, e.g., *Hamilton Die Cast, Inc. v. United States Fidelity and Guaranty Co.*, 508 F.2d 417 (7th Cir. 1975); *Maurice Pincoffs Co. v. St. Paul Fire and Marine Insurance Co.*, 447 F.2d 204 (5th Cir. 1971); *Arthur A. Johnson Corp. v. Indemnity Insurance Co. of North America*, 7 N.Y.2d 222; 164 N.E. 2d 704 (1959). Even if all of the paneling was improperly manufactured at one time by Champion's vendor (a proposition Continental does not concede and which is not established in the record), that is not the event for which Champion became liable. What Champion became liable for were the 1400 instances of delamination that occurred and caused damage at 1400 different times and places. Each instance of delamination caused damage. There is simply no basis for combining those separate events, widely separated in time and space, into one "occurrence."

2. What makes this case unusual is that both parties are urging precisely the opposite contentions normally advanced by an insured and his insurer when the unitary nature of events is in issue. If several claims are presented, the insured wants payment for each (up to the aggregate limits of his policy), and the insurer usually wants the events viewed as a single occurrence so that payments will not exceed the policy limit for a single occurrence. In this case, the fortuity of a series of small claims, each falling below the deductible amount, has impelled the insured to contend for a single occurrence; otherwise each claim is its responsibility under

the deductible clause. The insurer urges multiple occurrences so that the deductible clause will preclude any liability on its part. But what would the parties be urging (and the majority concluding) if serious personal injury had occurred, resulting in a series of claims each of which exceeded the deductible? Obviously the parties would then be in their accustomed roles, with the insured claiming multiple occurrences, and the insurer claiming a single occurrence. If, for example, a distributor bought a supply of defective tires, sold them to 26 retailers, and 1400 automobiles crashed seriously injuring at least one occupant per crash, would the distributor be urging us to conclude that his policy affords protection only up to the limit provided for one occurrence? Would he be contending that the installation of the tires was an "exposure" to the "conditions" of defective manufacture?

The fact that the claims in this case are small enough to make it advantageous for the insured to contend that the facts show only one occurrence does not persuade me that its position is correct. What concerns me about a decision upholding that position is the implication for future cases where similar reasoning might free an insurer from its proper responsibility for substantial claims. I hope my fears are unwarranted.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 9th day of December, one thousand nine hundred and seventy-six.

Present: HON. LEONARD P. MOORE,
HON. WILLIAM H. TIMBERS, C.JJ.,
HON. JON O. NEWMAN, D.J.

75-7664

[Filed Dec. 9, 1976]

CHAMPION INTERNATIONAL CORPORATION,
Plaintiff-Appellee
v.

CONTINENTAL CASUALTY COMPANY,
Defendant-Appellant

Appeal from the United States District Court
for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellant.

A. DANIEL FUSARO
Clerk

By: /s/ Vincent A. Carlson
Chief Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-seventh day of January, one thousand nine hundred and seventy-seven.

Present: HON. WILLIAM H. TIMBERS,
HON. LEONARD P. MOORE,
Circuit Judges
HON. JON O. NEWMAN,
District Judge

Docket No. 75-7664

[Filed Jan. 26, 1977]

CHAMPION INTERNATIONAL CORPORATION,
Plaintiff-Appellee
v.

CONTINENTAL CASUALTY COMPANY,
Defendant-Appellant

A petition for a rehearing having been filed herein by counsel for the plaintiff-appellant

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

/s/ A. Daniel Fusaro
A. DANIEL FUSARO
Clerk

By: /s/ Vincent A. Carlson
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-seventh day of January, one thousand nine hundred and seventy-seven.

Docket No. 75-7664

[Filed Jan. 26, 1977]

CHAMPION INTERNATIONAL CORPORATION,
Plaintiff-Appellee

v.

CONTINENTAL CASUALTY COMPANY,
Defendant-Appellant

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for the defendant-appellant, CONTINENTAL CASUALTY CO., and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ Irving R. Kaufman
IRVING R. KAUFMAN
Chief Judge

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Champion International Corporation (Champion) filed this action to recover \$1,000,000 from Continental Casualty Company (Continental), one of Champion's insurers. This Court has jurisdiction under 28 U.S.C. § 1332.

Champion sells construction materials, among other things. In 1969 and 1970, Champion bought a large number of vinyl covered plywood panels from Continental Vinyl Products Corporation (Continental Vinyl). Champion then sold the panels to many manufacturers, who installed them in the interiors of houseboats, house trailers, motor homes and campers.¹ Many of the panels were defective; after they were installed, the vinyl covering peeled off and exposed the underlying raw plywood.

More than 1400 vehicles manufactured by at least 26 different firms were damaged by the defective panels. Champion assumed liability for the damages; it paid more than \$1.6 million to settle the claims of the manufacturers and the purchasers of the damaged vehicles. The damage sustained by a single vehicle was always less than \$5,000.

¹ The panels were usually sold in small lots, as required by the production schedules of the purchasing manufacturers. For example, Cobra Industries, Inc., received 105 separate shipments of the panels from January, 1969, to March, 1970; Cobra manufactured 224 of the damaged trailers from April 9, 1969, to November 19, 1969. Nauta-Line, Inc., manufactured 260 of the damaged houseboats from April 3, 1969, to June 26, 1970.

During 1969 and 1970, when it was discovered that many of the panels were defective, Champion was insured under two policies: a comprehensive general liability policy issued by Liberty Mutual Insurance Company (Liberty), and an umbrella excess third party liability policy issued by the defendant, Continental.

The Liberty policy provided Champion with the following coverage:

"The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of . . . property damage to which the policy applies, caused by an occurrence . . . but the company shall not be obligated to pay any claim or judgment . . . after the applicable limit of the company's liability has been exhausted by payments of judgments or settlements."

Liberty's coverage was limited to \$100,000 for each "occurrence", and \$200,000 aggregate, with a \$5,000 deductible per occurrence.*

The Liberty policy defined "occurrence", "damages", and "property damage" as follows:

"'occurrence' means . . . an accident, including injurious exposure to conditions, with results, during the policy period, in bodily injury or property

* Endorsement No. 8 of the Liberty policy provided for a designation as to whether the deductible amount was to apply per claim or per occurrence. Per occurrence was chosen. Endorsement No. 8 provided:

"SCHEDULE

Coverage	Amount and Basis of Deductible	
Bodily Injury Liability	\$	per claim
	\$	per occurrence
Property Damage Liability	\$	per claim
	\$5,000	per occurrence"

damage neither expected nor intended from the standpoint of the insured"

"for the purpose of determining the limit of the company's liability . . . all . . . property damage arising out of continuous or repeated exposure to substantially the same general conditions . . . shall be considered as arising out of one occurrence."

"'damages' includes . . . damages for loss of use of property resulting from property damage[.]"

"'property damage' means injury to or destruction of tangible property."

The Liberty policy contained a provision on occurrences which result in damage over a long period:

"If the same occurrence gives rise to . . . property damage which occurs partly before and partly within the policy period, the each occurrence limit and the applicable aggregate limit or limits of this policy shall be reduced by the amount of each payment made by the company with respect to such occurrence under a previous policy or policies of which this policy is a replacement."

The Liberty policy also contained a provision relating to a single occurrence which results in property damage sustained by one or more persons.

"Coverage B—The total liability of the company for all damages because of all property damage sustained by one or more persons or organizations as the result of any one occurrence shall not exceed the limit of property damage liability stated in the declarations as applicable to 'each occurrence'."

The Continental policy provided coverage in excess of Liberty's basic policy. The Continental policy indemnified Champion for all money which Champion was obligated to pay

"for damages, direct or consequential, and expenses, all as defined by the term 'ultimate net loss' on account of . . . Property Damage . . . caused by or arising out of each occurrence."

The Continental policy defined "ultimate net loss" as the

" . . . total sum which the Insured or any company as his insurer becomes obligated to pay by reason of . . . Property Damage . . . , either through adjudication or compromise, and all sums paid for expense[s]"

The limit of Continental's liability was \$1,000,000 for any occurrence in excess of the amount recoverable from Liberty. Continental's liability was also limited to \$1,000,000 for multiple occurrences.

"Occurrence" was defined as

" . . . an event or continuous or repeated exposure to conditions, which unexpectedly causes . . . Property Damage . . . during the policy period."

Finally, the Continental policy contained the following provision:

" . . . [I]n the event of loss for which [Champion] has coverage under [underlying insurance], the excess of which would be recoverable hereunder, except for terms and conditions of this policy which are not consistent with the underlying, then, notwithstanding anything contained herein to the contrary, this policy shall be amended to follow the terms and conditions of the applicable underlying insurances in respect of such loss."

Continental admits that the damage to the vehicles which resulted from the defective panels constituted prop-

erty damage covered by the Liberty and Continental policies.³

Champion argues that the damages to all of the vehicles arose from a single occurrence. Under this interpretation, Champion may recover all of its damage, less the \$5,000 deductible and less the \$100,000 paid by Liberty, but not exceeding the \$1,000,000 limit of liability.

Continental argues that the damage to each vehicle was a separate occurrence within the meaning of the policies. Because no vehicle sustained damage in excess of \$5,000, the amount deductible for each occurrence, Continental argues that Champion is not entitled to anything under the Continental policy.

Each party contends that the language of the policies is clear and unequivocal and supports its contentions. Each party concedes that if a policy is ambiguous, the language is to be construed against the insurance company. The New York rule goes further and provides that if a policy can be reasonably construed in favor of the position asserted by the insured, he is entitled to recover. See *Datalab, Inc. v. St. Paul Fire & Marine Insurance Co.*, 347 F.Supp. 36, 38 (S.D.N.Y. 1972); *Sincoff v. Liberty Mutual Fire Ins. Co.*, 11 N.Y.2d 386, 230 N.Y.S.2d 13, 183 N.E.2d 899 (1962). This rule is particularly applicable when the policy is denominated a "comprehensive general liability policy". *National Screen*

³ I believe that this is a fair conclusion from Continental's admissions that

"(1) the diminution in value of vehicles resulting from the delaminations of the panels constituted property damage within the 'products hazard' as those terms are defined in the Liberty Mutual policy and in the Umbrella Excess policy, and

(2) the liability of Champion for such property damage is a type of liability covered by the Liberty Mutual policy and the Umbrella Excess policy under the 'Products Hazard', subject only to the application of the limits of liability of the policies and the provisions of the policies with respect to other insurance."

Serv. Corp. v. United States Fidelity and Guaranty Co., 364 F.2d 275, 279-280 (2d Cir. 1968). Here the Liberty policy was so denominated. The Continental policy is an umbrella excess third party liability policy, which appears to afford even broader coverage.

I believe that this is a fair rule of construction. The contested provisions of both the Liberty and Continental policies are standard ones. They are in similar policies issued by many companies.

Insurance companies could prepare policies in clear, simple and precise language which would inform insureds of the limits of their coverage. Insurance companies could avoid the risk of ambiguity if they use short and precise words and short and simple sentences to express their intent clearly. In spite of continued admonitions of the courts to get rid of such language, insurance companies continue to issue such policies using insurance jargon and verbose and meaningless generalities, all of which result in ambiguities.

I do not know whether the Continental policy was ever intended to cover this type of loss. But Continental's admissions that this is the type of loss which the policy was designed to cover require me to decide this case solely on whether there was one occurrence which proximately resulted in damage to many vehicles, or whether the damage suffered by each of those vehicles was a separate occurrence.

On this issue, I find in favor of the plaintiff because I find that the contested language is ambiguous. The interpretation urged by the plaintiff may not be the only reasonable interpretation, but it is a reasonable one. That is all plaintiff is required to prove.

In making this determination, I have given no weight to the fact that Liberty, under its policy, paid Champion.

This opinion shall constitute findings of fact and conclusions of law in accordance with Fed. R. Civ. P. 52(a).

The parties may submit additional findings.

Plaintiff shall submit an appropriate judgment in accordance with this opinion.

Dated this 1st day of May, 1975.

/s/ Gus J. Solomon
United States District Judge

APPENDIX E
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
 [SAME TITLE]

In a written opinion dated May 1, 1975, I held in favor of the plaintiff on the issue of liability. I held that there was one occurrence which proximately resulted in damage to many vehicles, as opposed to defendant's sole contention that it had no liability under its policies because each of the vehicles damaged was a separate occurrence and the damage to each vehicle was less than \$5,000.00, the amount of the deductible for each occurrence.

I assumed that once the issue of liability was determined, there would be no question that plaintiff suffered damages far in excess of the face of the policy. I therefore requested counsel for plaintiff to submit an appropriate judgment. Plaintiff did submit such a judgment for \$1,000,000.00 plus interest.

Thereafter, defendant notified me that it had proceeded on the assumption that the issue of damages had been segregated from the issue of liability and that it was now entitled to put on evidence on the issue of damages. Defendant then sought information which went far beyond the issue of damages and which could only be relevant to the issue of liability.

In a memorandum dated June 12, 1975, I stated that I had already decided all issues relating to liability and that I did not propose to consider these issues again.

Both plaintiff and defendant submitted requests for additional findings. In a memorandum dated June 18, I rejected all of them as either unnecessary or incorrect.

Since that time, the defendant has again raised issues of liability. I have considered the authorities on which defendant relies, and I reject them.

On the record heretofore made and on the evidence adduced and the admissions of defendant made at the hearing on damages, held September 29, 1975, I find:

Plaintiff employed the Liberty Mutual Insurance Company to investigate and settle plaintiff's liability for property damage in connection with the delamination of the defective vinyl-covered panels, and this was done with defendant's knowledge and consent and without any admission on the part of the defendant of any liability under its policy;

Liberty Mutual did investigate, adjust and settle a great number of such claims, for which it charged a fee of 15 per cent of the amount of settlement;

As of September 13, 1974, plaintiff paid Liberty Mutual a total of \$1,513,116.82 for the settlement of the claims for property damage in connection with the delamination of the defective vinyl-covered panels produced by Continental Vinyl Products Corp. and for expenses and fees for the investigation, adjustment and settlement of those claims;

These payments were reasonable and were made in good faith for the purpose of settling liability against the plaintiff because of the defective vinyl-covered panels which plaintiff had acquired from Continental Vinyl;

Plaintiff paid out in excess of \$1,000,000.00 over and above the \$100,000.00 paid by Liberty Mutual under its policy and the \$5,000.00 deductible under defendant's policy.

I therefore hold that plaintiff is entitled to a judgment against the defendant for \$1,000,000.00 with interest

from the dates plaintiff made payments to Liberty Mutual in settlement of the claims against plaintiff.

This memorandum opinion on the issue of damages shall constitute findings of fact and conclusions of law under Fed. R. Civ. P. 52(a).

Plaintiff shall forthwith submit a form of judgment in accordance with this memorandum opinion.

Dated this 31st day of October, 1975.

/s/ Gus J. Solomon
United States District Judge